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IN THE

Supreme Court of the United States

October Term, 1967.

No. 528.

MARION J. BERGUIDO, Individually, MARION J. BERGUIDO, ROBERT G. ROWE and WARREN H. WOODRING, Executors of the Estate of CARLOS BERGUIDO, JR., and JUNE BERGUIDO, JOY BERGUIDO, JILL BERGUIDO and CARLOS BERGUIDO, 3rd, by Their Guardian, MARION J. BERGUIDO,

Petitioners,

v.

EASTERN AIRLINES, INCORPORATED,

Respondent.

PETITIONERS' REPLY BRIEF TO RESPONDENT'S ANSWER.

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S ANSWER.

The whole tone and tenor of respondent's brief in opposition to the Petition for the Writ of Certiorari is directed to the proposition that plaintiff's counsel did not raise the question of the inadequacy of the ticket and its implications in the courts below. Petitioner throughout was troubled as to whether the Warsaw Convention applied and if it did, what its effect was. But definitely and explicitly she at the trial articulately or otherwise reserved her rights thereunder (117a). All that the petitioner did admit at the trial was that her challenge on the basis of the tax laws to implications of the Warsaw Convention was without merit. Now we are being criticized for our candidness.

However, whatever stance was assumed in the lower court just does not matter. The law is quite clear, both in the 3rd Circuit and in This Court. Where a case has been tried on law which is inappropriate to the case, the Courts of Appeals and this Court will reverse in order to see to it that the proper law is applied to the case. Otherwise there has been no trial on the true issues. In *United States v. Certain Parcels of Land, etc.*, 144 F. 2d 626, 630 (C. A. 3, 1944) that Court said:

> "The appropriate law must be applied in each case and upon the failure to do so appellate courts should remand the cause to the trial court to afford it opportunity to apply the appropriate law, *even if the question was not raised in the Court below. Pecheur Losenge Company, Inc. v. National Candy Company,* 315 U. S. 666, 62 S. Ct. 853, 86 L. ed. 1103." (Emphasis supplied.)

See also *Fassbinder v. Pennsylvania Railroad Company,* 322 F. 2d 859 (C. A. 3, 1963) where the plaintiff rejected a certain theory of the case which was raised by the court at the argument and then again rejected it at reargument on the appeal before the Third Circuit. Nonetheless, the Court *on its own* reversed in his favor and held that

that theory was the law of the case. In the instant case the very argument raised in the Petition for the Writ was thoroughly briefed and argued in the Court of Appeals. In *Fassbinder v. P. R. R. Co., supra,* the point was raised for the first time from the bench by the Court of Appeals. We are attaching hereto a copy of one of our briefs in the Court of Appeals which demonstrates that we made the very same argument we made here today relative to Articles 3(1) and 17—namely, that the delivery of an inadequate ticket imposes absolute, unlimited liability upon the defendant.

This proposition of law makes sense. A trial not predicated on the central essentials of law in the case is in fact and justice no trial at all.

Defendant's *ad hominem* attacks avail it nothing since it is made quite clear by the opinion of the Court of Appeals for the Third Circuit that it considered precisely this argument on the appeal. See the discussion by Judge Forman at pages 70, 71 of Appendix F. Judge Forman did not reason out the question of the adequacy of the ticket because he found that even though an inadequate ticket was delivered, it was still necessary for the plaintiff nonetheless to prove negligence even though the flight was an international flight, and, thus Warsaw. The dissent did not agree with this and it specifically reached, considered and decided this very question. It held the ticket was inadequate. It held that the ticket was just as inadequate as the ticket in *Lisi.* The same question, namely, the inadequacy or adequacy of the ticket was involved in *Lisi.* The same question is here involved. And if it is decided that this ticket was legally inadequate, as decided in *Lisi, Warren v. Flying Tiger,* 352 F. 2d 494 (C. A. 9, 1965) and *Mertens,* 341 F. 2d 851 (1965) in the Second Circuit, hold that the plaintiff may recover unlimited damages. This should be the law here.

It was respondent (airline), which in its effort to prove that this was a Warsaw case, put into evidence what it represented to be accurate and complete copies of the

ticket here in question. This was the defense in this case and was so pleaded (25a). By so doing, it succeeded in having the trial judge declare this to be a Warsaw case, with the limitations under Article 22(3) applicable to the damage issue. The judge limited the damages accordingly to $8300.

These tickets are therefore very much in evidence. They are part of the trial record. It is therefore ridiculous to argue as does Eastern that there is no record proof from which to argue the effect of Articles 3(1) and 17 of the Convention. If the tickets, having been made part of the record by Eastern, were sufficient without proof of their color, backs, size, style or type to enable Eastern to impose Warsaw's character and its limitations as found by the judge, then they were necessarily sufficient without proof of color, backs, size, style or type to require the judge or judges to determine the *legal question* of the adequacy or inadequacy of the tickets under Articles 3(1) and 17, under Warsaw as was done in *Lisi.*

The real weakness of the defendant's answer is found in the absence of any attempt by it to contend that the ticket complied with Article 3(1). We respectfully submit that this absence is intentional. For any discussion of the adequacy of the ticket places this case in the exact same status as the *Lisi* case and the result in both cases certainly should be the same. We are quite content to let the question of whether certiorari is granted in this case depend upon a determination as a matter of law whether the tickets in this case were adequate or not, as compared to the tickets in the *Lisi* case. We fearlessly state that by comparison the *Berguido* tickets fail to offer even the minimal information given by the *Lisi* tickets.

Respectfully submitted,

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EXHIBIT A.

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INTRODUCTION.

The history of this case has been turbulent. It represents years of burden for the litigants, for counsel and for the courts. In a nutshell, we now find ourselves looking back over very protracted litigation in which the plaintiff initially gained a verdict from a jury which this Court took from her on a single evidentiary point: the hearsay-based calculations.

Having successfully protested a denial of cross-examination on that evidence, defendant got its opportunity on the retrial and then chose not to use it. It is the final irony of this taxing litigation that the calculations turned out to be factually accurate.

In the latest stage of the litigation a judge without a jury, in what we deeply feel was an overzealous effort to end this litigation, found that the plaintiff did not prove the airline guilty of wilful misconduct by a preponderance of the evidence. It is in the interest of judicial administration that litigation should come to an end. But it is in the highest interest of judicial administration that it should come to an end justly.

That is why we are here.

ARGUMENT.

I.

As extraordinary as it may sound, the American Bench and Bar traditionally have seen Warsaw's trees but never the forest. The unseen forest is that *the Warsaw Convention is a treaty of absolute liability.*

The overwhelming tradition among American judges and lawyers is to think of Warsaw, not in terms of absolute liability at all, but in terms of this severe limitation of damages ($8,300.00). This traditional thinking has obscured the plain, fundamental and certain meaning of the Treaty. Our concession that we too have labored in this obscurity may add another thorn to the prickly history of this litigation, yet surely it is necessary for this Court to clarify the meaning of the Treaty for the case at bar and for the host of Warsaw cases that flow into our courts in ever-increasing numbers.

The structure of Warsaw needs to be identified for what it really is.

Once an international flight is within its ambit, the Convention takes hold exclusively and absolutely of the rights and the responsibilities as between passengers injured or killed on such flights and their carriers. Under Article 17 of the Treaty "The carrier *shall* be liable for damage sustained . . . [for death or bodily injury] . . ." (Emphasis supplied.)

Thus, liability under the Treaty initially is absolute. The Treaty requires of the passenger neither proof of negligence nor wilful misconduct in order for unlimited, absolute liability to attach. It imposes liability regardless of fault. In *Grey v. American Airlines,* 227 F. 2d 282 (C. A. 2, 1955), it was held at 285:

> "Article 17 imposes an absolute liability upon the carrier for all personal injuries, regardless of fault, 'if the accident which caused the damage so sustained took place on board the aircraft.'"

From that foundation of absolute and unlimited liability the text of the Convention proceeds to enumerate very technical and precisely drawn conditions precedent to the carrier's relief from such total liability. If these conditions are not *exactly* fulfilled, the liability upon the carrier remains absolute and unlimited. *Westminster Bank, Ltd. v. Imperial Airways, Ltd.*, 2 All E. Rep. 890, 1 Avi. 618 (1936).

The conditions precedent are set forth in the Convention in Article 3(1). They read as follows:

> "For the transportation of passengers the carrier *must* deliver a passenger ticket which *shall* contain the following particulars:
>
> (a) The place and date of issue;
>
> (b) The place of departure and of destination;
>
> (c) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;
>
> (d) The name and address of the carrier or carriers;
>
> (e) A statement that the transportation is subject to the rules relating to liability established by this convention." (Emphasis supplied.)

The heart of this brief is that three of these conditions precedent were never fulfilled by the defendant carrier, and we shall shortly turn to that discussion. Prior to doing so, we respectfully submit what we believe to be the proper and indeed only accurate view of the pattern of the Treaty.

Assuming satisfaction of all of these conditions precedent, the absolute and unlimited liability of the Treaty is subject to the following legal possibilities:

1. If the carrier proves that it and its agents have taken all necessary measures to avoid damage or that it was impossible for them to take such measures, the carrier is discharged of all liability. Article 20.

2. Assuming that the carrier cannot prove that it has taken all necessary measures to avoid the damage or that it was impossible for it to take such measures, the carrier is absolutely liable for not more than $8,300.00. Article 22(1).

3. If, however, the claimant can prove that the damage was caused by the wilful misconduct of the carrier, then the carrier may neither exclude nor limit its liability. Article 25.

In this case the conditions precedent were not satisfied, and therefore the defendant is absolutely and unlimitedly liable under Article 17. We shall now demonstrate the accuracy of this conclusion.

II.

In the face of the record, Judge Boldt's findings of fact are irrelevant. As a matter of law he was bound to grant plaintiff's motion for judgment at the conclusion of the evidence (1248a-1249a).

The wilful misconduct aspect of this case has been treated extensively in our earlier briefs. It is to the legal consequence of the inadequate ticket that we now turn.

When we filed our earlier brief on this appeal we did not apprehend what we now know is the true legal nature of Warsaw's scheme of liability. We therefore did not accurately argue the legal consequences of defendant's non-compliance with the Treaty. Our failure to present what is in truth the appropriate law should be corrected now before oral argument.

It has always been the law of this Circuit that "The appropriate law must be applied in each case and upon a failure to do so appellate courts should remand the cause to the trial court to afford it opportunity to apply the

appropriate law, *even if the question was not raised in the court below.*" (Emphasis supplied.) *United States v. Certain Parcels of Land, Etc.*, 144 F. 2d 626, 630 (C. A. 3, 1944).

As our first brief here pointed out, this record demonstrates that defendant failed to satisfy the strict requirements of Article 3(1) of the Convention in these three specific respects:

1. The record does not reveal an adequate delivery of the ticket in compliance with the requirements of Article 3(1). There is an absolute failure of proof as to how, when and under what circumstances the ticket was delivered (if it was delivered) to Mr. Berguido.

2. The ticket fails to comply with Article 3(1)(e) in that it does not explicitly disclose the restrictions of Warsaw, and because the clause in question is printed in such fine print that it is practically illegible.

3. The ticket fails to comply with Article 3(1)(c) in that it does not set forth Jacksonville as one of the "agreed stopping places".

If, among other things, the defendant either failed to show an adequate delivery of an appropriate ticket—one which adequately and explicitly warned on its face of Warsaw's exclusions and limitations as well as declaring Jacksonville as an agreed stopping place—it is bound in absolute and unlimited liability from which it may not claim relief. This is the crux of the entire litigation. Understanding Warsaw for what it really is, we finally see the case in its proper light: defendant is absolutely, unlimitedly liable for the death of Mr. Berguido.

Our earlier brief on this appeal discussed the nondelivery of the ticket, its illegibility, and its omission of an adequate statement that the transportation is subject to the limitation set forth in Warsaw.

It is necessary to add to that material only the following discussion with respect to the absence of Jacksonville—an agreed stopping place—on the ticket.

Jacksonville was an agreed stopping place. It was not on the ticket. Standing alone, this omission violates Article 3(1)(c) and absolute, unlimited liability attaches. This proposition raises *Grey v. American Airlines,* 95 F. Supp. 756 (D. C. S. D., N. Y., 1950), aff'd. 227 F. 2d 282 (C. A. 2, 1955).

Grey holds the carrier's failure to place an agreed stopping place on the ticket does not prevent the carrier from taking advantage of the limitations of damages available under Warsaw. We respectfully submit that *Grey* was wrongly decided and cannot be the law.

In order to understand *Grey,* it is necessary to understand those portions of the Convention dealing with "Transportation Documents". Article 3 involves "Passenger Ticket", Article 4 "Baggage Check" and Articles 8 and 9 "Air Waybill".

In each of these Articles there is a sub-section, specifying those particulars which "shall" be contained in the subject document. In Article 3 (passenger ticket) there is no provision contemplating the carrier's deletion of any of the five enumerated particulars. In Article 4(4) (baggage check) there is such a provision contemplating deletion of certain particulars as there also is in Article 9 (air waybill).

Faced with this scheme of the Transportation Documents Chapter of the Convention, the *Grey* court observed that Article 4(4) and 9 in effect specified certain minimal particulars which must be declared on either baggage checks or air waybills in order for the carrier to raise Warsaw defenses. Reasoning that since the Treaty has no comparable provision for passenger tickets (Article 3[2], *Grey* erroneously held that the passenger ticket did not have to contain any particulars. Delivery alone gave the carrier Warsaw's defenses.

Although agreeing with plaintiff that the ticket was incomplete, *Grey* rejected plaintiff's argument that the ab-

sence of agreed stopping places stripped the carrier of its defenses. This feature of the *Grey* case was affirmed by the Court of Appeals for the Second Circuit without discussion.

The grotesque consequence of its holding is that if *Grey* is the law, so long as *delivery* of a "passenger ticket" (whatever that is) is made, even though it may not disclose the place and date of its issuance (Article 3(1)[a]); the place of departure and destination of the flight (Article 3(1)[b]); the agreed stopping places of the flight (Article 3(1)[c]); the name and address of the carrier (Article 3(1)[d]); and a statement of Warsaw's limitations on the flight (Article 3(1)[e]), nonetheless such a delivered "passenger ticket' will allow the carrier to avail itself of the exclusions and limitations of the Warsaw Convention.

The mere statement of this unavoidable consequence of the *Grey* holding is proof enough that it is juridically intolerable. If *Grey* is right, Article 3(1) of the Warsaw Convention is a piece of meaningless international law which international carriers may ignore without consequence.

Exactly contrary to *Grey*, the meaning of the difference between Article 3 and the others is that *every* particular on the passenger ticket is indispensable to the creation of a ticket which gives the carrier its Warsaw defenses. The contrast between the categorical character of tickets under Article 3 and the qualified character of other transportation documents compels this conclusion. In other words, the very fact that Articles 4 and 9 contain statutory dilution of the apparently mandatory requirements of those articles and Article 3 contains no such dilution is a conclusive argument that no dilution of Article 3's requirements was either intended or permissible.

CONCLUSION.

If this Court concludes that the flight was within the ambit of the Warsaw Convention, then our previous argument that defendant's failure to prove delivery of an adequate ticket removes this case from Warsaw and places it in negligence is erroneous. Under the proper view of the true nature of the Warsaw Convention it is now clear that the defendant's failure to prove the delivery of an adequate ticket makes the defendant absolutely liable without limitation.

It is respectfully submitted that the judgment below be reversed.

Respectfully submitted,

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